Arb.P. 4/2006
BEFORE
HON'BLE THE CHIEF JUSTICE MR J CHELAMESWAR

JUDGMENT AND ORDER (ORAL)

This is an application under Section 11 of the Arbitration and Conciliation Act, 1996. The petitioner is a proprietary concern who entered into an agreement with the respondents on 5-6-02 for the performance of certain works, the details of which may not be necessary for the present purpose, for a total value of Rs.1,67,78,800/-. As per the term of the contract the work was required to be completed before the 15th November, 2002. The petitioner alleges that the respondents herein did not discharge the legal obligations arising under the contract as a consequence of which the petitioner could not execute the contract within the time mentioned above. It appears that the last date for completion of the contract work came to be extended from time to time by the respondents, eventually upto 31st December, 2004. It appears that the last extension was granted on condition that the petitioner pays liquidated damages to the respondents. Apart from that, the respondents also sought to recover certain amounts which was allegedly paid in excess of the entitlement of the petitioner. All these resulted in disputes between the parties and the work naturally could not be completed within the extended date.

2. By a communication dated 31-1-05 the respondents informed the petitioner that the contract was terminated w.e.f. 22-1-05. The petitioner thereafter claimed payment for the work done which was not made by the respondents. Thereafter various letter came to be issued by the respondents proposing to recover certain amounts under the Head Penalty , the details of which may not be necessary for the present purpose.

3. In the background of the above mentioned facts, the petitioner alleges that it claimed a total amount of Rs.14,56,728/- on 19-12-05 through registered post which was not honoured. On 25-4-06 the petitioner served a notice U/s 11 of the Arbitration and Conciliation Act, 96 which was received by the respondents on 27-4-06. By the said notice the petitioner called upon the respondents to refer the dispute for arbitration in terms of the arbitration agreement between the parties. The said notice did not evoke any response until the petitioner approached this court by way of the present petition.

4. It is also to be mentioned that this petition came to be filed on 9-6-06. Subsequently the respondents chose to nominate two Arbitrators (Gazetted Officers of the Railways) by a communication dated 13-6-06.

5. On the face of the arbitration agreement undoubtedly the petitioner is entitled for arbitration of the dispute between it and the respondents. The learned counsel for the respondents also does not dispute the position that there is an arbitrable dispute between the parties. But the only submission made by the learned counsel for the respondents is that in view of specific term of the arbitration agreement only the Gazetted Officers of the Indian Railways could be appointed as Arbitrators.

6. On the other hand, the learned counsel for the petitioner submitted that in view of the fact that the respondents did not nominate their Arbitrators within the time stipulated by the arbitration agreement or before the petitioner approached this court by way of the present petition, the respondents forfeited their legal right to insist upon the appointment of the Arbitrators as agreed upon by the parties. The learned counsel for the petitioner relied upon a decision of the Supreme Court reported in (2000) 8 SCC 151 . At para 19 of the said judgment the Supreme Court held as follows :-

19. So far as cases failing under Section 11(6) are concerned - such as the one before us- no time limit has been prescribed under the Act, whereas a period of

30 days has been prescribed under Section 11(4) and Section 11(5) of the Act. In our view, therefore, so far as Section 11(6) is concerned, if one party demands the opposite party to appoint an arbitrator and the opposite party does not make an appointment within 30 days of the demand, the right to appointment does not get automatically forfeited after expiry of 30 days. If the opposite party makes an appointment even after 30 days of the demand, but before the first party has moved the court under Section 11, that would be sufficient. In other words, in cases arising under Section 11(6), if the opposite party has not made an appointment within 30 days of demand, the right to make appointment is not forfeited but continues, but an appointment has to be made before the former files application under Section 11 seeking appointment of an arbitrator. Only then the right of the opposite party ceases. We do not, therefore, agree with the observation in the above judgments that if the appointment is not made within 30 days of demand, the right to appoint an arbitrator under Section 11(6) is forfeited.

However, the learned counsel for the respondents Mr UK Nair relied upon two decisions of the Supreme Court reported in (2004) 10 SCC 504 and AIR 2007 SC 285 .

7. The decision reported in (2004) 10 SCC 504 2 pertains to a case arising under the Arbitration Act, 1940. An application U/s 20 of the Arbitration Act, 1940 came to be filed before the High Court for appointment of an Arbitrator. The High Court choose to appoint a retired Judge of the High Court to be the Arbitrator in that matter. Aggrieved by the same the matter was carried to the Supreme Court. The Supreme Court held that in view of the specific agreement between the parties to have their disputes resolved by two Gazetted Railway Officers the High Court was not justified in referring the matter to the sole Arbitrator, a retired Judge of the High Court.

8. However, in AIR 2007 SC 285 3 the Supreme Court once again went into the various cases touching on the subject including both the above mentioned cases. In the said case the Supreme Court was dealing with once again an arbitration agreement between the Indian Railways and a contractor where the arbitration is identical with the arbitration clause in the present case. But it was a case where the General Manager of the Railways had appointed an Arbitrator before the opposite party approached the High Court by way of an application U/s 11 of the Arbitration Act. It is in this background the Supreme Court after examining the various cases relied upon by the parties including the above mentioned two cases directed the Railways to appoint Arbitral Tribunal within a specified period in view of the fact that the Railways had already indicated its choice of the Tribunal in terms of the arbitration agreement in which situation the Supreme Court opined that the principle laid down in MP Gupta's case [(2004) 10 SCC 504 2], referred to earlier, is applicable. At the same time the Supreme Court also categorically held :-

> & & & In case, the General Manager, Railways does not appoint the arbitral tribunal after expiry of the notice of 30 days or before the party approaches the High Court, in that case, the High Court will be fully justified in appointing arbitrator under section 11 of the Act & & & .

In substance, the Supreme Court approved the principle laid down in Datar Switchgear's case [(2000) 8 SCC 151 1].

9. However, the learned counsel for the respondents submitted that in view of the language of Sub Section 8 of Section 11 the court is still required to have due regard to the qualifications required by the Arbitrator as per the terms of the agreement between the parties and, therefore, submitted that this court should still consider appointing some officers of the Indian Railways. Sub Section 8 of Section 11 of the Act, 1996 reads as follows :-

> 11. Appointment of arbitrators . -
> (1) &
> (2) &

(3) &
(4) &
(5) &
(6) &
(7) &

(8) The Chief Justice or the person or institution designated by him, in appoin ting an arbitrator, shall have due regard to -
(a) any qualifications required of the arbitrator by the agreement of the partie s; and
(b) other considerations as are likely to secure the appointment of an independe nt and impartial arbitrator.

10. In my opinion the provision is meant for facilitating the smooth conduct of arbitration having regard to the nature of the dispute and the quali fications required on the part of the Arbitrators to tackle the issues. The issu e on hand, in my view, does not require any technical expertise. On the factual background of the issues, already noted above, the issues before the Arbitrator, in my opinion, will be purely in the realm of law. I am, therefore, of the opin ion that the party (respondents) who did not act in compliance with the terms of arbitration agreement ought not to be given the advantage of appointing Arbitra tor of their choice.
11. In the circumstances, this petition is allowed appointing Shri P C Borpujari, retired District & Sessions Judge, Kamrup, Guwahati as the Arbitrat or.

12. The petition stands disposed of. No cost.